



Montana Legislative Services Division

Legal Services Office

TO: Water Policy Interim Committee Members
FROM: Cori Hach, Staff Attorney
RE: Summary of Presentation on Court decisions on expanded places of use for a water right

As requested by the committee, the following is a copy of the notes I used during my October 13, 2021 presentation. This is an informal document that has not been through our internal editing process.

Question Presented:

Request was for court decisions saying that department approval or water court approval is needed prior to increasing the acreage under irrigation by a water right. Hypothetical situation is that switching from flood irrigation to pivot irrigation can allow an irrigator to reach acreage that previously was too high to be reached, so you could have a situation where gravity is not as big of a factor, plus the method is more efficient, so you could theoretically cover more acres with the same quantity of water and the question is: do you need to go to the department or the water court to effectuate that change?

Statutory Framework:

Water Use Act is unambiguous on this question for changes occurring post-1973. Prior to the enactment of the Water Use Act, the *historical* procedure for changing an appropriation right allowed a water user to make any change that they wanted, and then force adversely affected parties to bring suit to show that the change was impermissibly injurious. But the Water Use Act modified that procedure to require a water user to apply to DNRC for authorization to change prior to making the change. Two MCA sections are particularly relevant:

(1) 85-2-102, MCA, subsection (7)(a) defines "change in appropriation right" as "a change in the place of diversion, **the place of use**, the purpose of use, or the place of storage."

(2) 85-2-402(1)(a), MCA, provides that "an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature."

To summarize, under the Water Use Act, an appropriator may not change the place of use of a water right without the approval of the department, and a plain language interpretation would provide that irrigating additional, different acres would constitute a change in the place of use of the water right.

Case Law Analysis:

Two important related concepts are important to understanding why expanding the acreage irrigated would in many cases be considered to be an unlawful expansion of use: (1), the historical use of a water right and why that concept is so significant, and (2), the principle that an appropriator is entitled to the

actual stream conditions as they existed when they first made their appropriation.

Historical Use:

- It is critical to understand that the scope of a water right is equal to and limited by its historical use, or in other words "that quantity **within** the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use." That quotation is from Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924), but you'll also see that or similar phrasing repeated throughout the Montana case law. And what that means in practice is that the historical use can be and often is narrower than the decreed right. (Examples: even if a water right is decreed for 4 cfs, if the most that the irrigator has ever diverted and the most that the ditch has ever supported is 2 cfs, the historical use that water right is actually only for 2 cfs; similarly, a water right could be decreed for use on an entire quarter quarter section, but if the most that it can be demonstrated was ever historically irrigated is 10 acres, the water right is confined to that historical use regardless of what the decree says.)
- Quote from Smith v. Duff, 39 Mont. 382, , 102 P. 984, 986 (1909): "If MacFarlane had been the sole owner of the canal, which had a carrying capacity of 400 inches when appellants made their appropriation, and yet for 20 years prior to appellants' appropriation he had never irrigated in excess of 12 acres of land, his prior right would be confined to enough water to irrigate that land. The court would say that was all he ever intended to use, deducing his intentions from his acts during that long period of time. One is not permitted to obtain the exclusive control of an entire stream by appropriation 'unless his appropriation is made for some beneficial purpose, presently existing or contemplated.'" (internal citation omitted).

Good explanation from court for the reason for this limitation. "A subsequent appropriator is entitled to have the water flow in the same manner as when he located, and 'he may insist that prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.'" (internal citation omitted)

Emphasize that case law is extremely clear that actual, reasonable, historic beneficial use is the true limit that cannot be exceeded for any given water right, even though there is often confusion about this among water rights holders who believe they are allowed to use up to and including the maximum amount of water and place of use described in their decree.

Actual Stream Conditions at Time of Appropriation:

- Courts note over and over again that an appropriator is entitled to the *actual* stream conditions at the time of their appropriation, rather than the *decreed* stream conditions. Those two sets of conditions are going to be very different because there was a common practice of wildly overclaiming a water right on your statement of claim, so what these senior users were actually historically diverting and putting to beneficial use was in many or most cases significantly less than the maximum amount described in their decree. Critical to understand that the lesser, actual amount is what constitutes the stream conditions that the junior appropriators are entitled to the maintenance of.
- Quote from Quigley v. McIntosh, 110 Mont. 495, 505, 103 P.2d 1067, 1072 (1939) that

summarizes and ties together these concepts:

"It seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed, to the injury of subsequent appropriators. Obviously, if he could do so, junior appropriations might be of little or no benefit and the following three well-established principles of water rights by appropriation would be nullified: First, that place of diversion, or place or purpose of use, may be changed only "if others are not thereby injured"; second, that subsequent appropriators of water take with notice of the conditions existing at the time they make their appropriations; third, that "as between appropriators the one first in time is first in right"; for by what constitutes an additional or third use or appropriation by the first user, an intervening appropriation by a second user, although earlier in time, might be entirely destroyed. (internal citations omitted).

Royston Case Summary:

There is a 1991 Supreme Court case with a very similar fact pattern to the hypothetical situation described to me, In re Application for Change of Appropriation Water Rights Nos. 101960-41S & 101967-41S, 249 Mont. 425, 816 P.2d 1054 (1991). In that case the Royston's had existing rights to flood irrigate 86 acres at a cumulative flow rate of 1250 gpm combining two water rights sourced from Ross Fork Creek. They applied to the DNRC to change the place of use of those water rights to increase the acreage irrigated from the original 86 acres to 266 acres by sprinkler irrigation instead of flood irrigation. Other irrigators on Ross Fork Creek filed objections on the grounds that the proposed expansion would result in greater depletion of Ross Fork Creek than historically had occurred, resulting in injury to junior water users. The DNRC denied the change application on a number of grounds, and the Supreme Court upheld the denial on appeal. Among its many other technical findings, the DNRC noted in its decision that due to the proximity of the originally irrigated acreage to the creek, most of the unconsumed water quickly returned to the creek, but that the new places of use were further away and so there would be significantly less immediate return flow to Ross Fork Creek. The Supreme Court did not dive too deeply into the department's technical findings except to uphold them under a deferential MAPA review. Rather, its decision rested on a discussion of why the applicants were required to make all these showings in the first place, and why was the burden on them to show non-injury instead of the objectors to show injury from the proposed change.

The Royston's first argued that the burden should be on the objectors to demonstrate that there *would* be an adverse impact on other water rights caused by the proposed change rather than them as the applicants to demonstrate that there *wouldn't be*. The Supreme Court rejected this argument and concluded that under the 1973 Water Use Act as amended in 1985, the applicant for a change of appropriation right clearly has the burden as to the nonexistence of adverse impact. The Royston's alternatively argued that even if this was the correct interpretation of the statutory scheme post-1973, it shouldn't be applied to them because their water rights predated the Water Use Act. The Supreme Court further concluded that the statutory scheme applies to both pre- and post-1973 water rights and that this is not an unconstitutionally retroactive application of the law.